

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

DERIK L. MAPLES,

Petitioner,

v.

MARGARET GILBERT,

Respondent.

CASE NO. 16-cv-5209 RJB-JRC

ORDER ON REPORT AND
RECOMMENDATION

This matter comes before the Court on the Report and Recommendation of U.S. Magistrate Judge J. Richard Creatura. Dkt. 24. The Court has considered the Report and Recommendation and the remaining record.

Petitioner challenges his state court conviction, for second-degree felony murder and first degree assault both while armed with a firearm, and sentence, totaling 456 months, pursuant to 28 U.S.C. §2254. Dkt. 1. On January 31, 2017, the Report and Recommendation was filed, recommending that Petitioner's grounds for relief 1, 2, 3, and 4 be denied on the merits; and ground five be dismissed as unexhausted and procedurally barred. Dkt. 24. In the alternative,

1 the Report and Recommendation recommends that ground five be denied on the merits. *Id.* The
 2 Report and Recommendation recommends that a certificate of appealability not issue. *Id.*

3 **Petition.** The Report and Recommendation’s recommendation that grounds for relief 1,
 4 2, 3, and 4 be denied on the merits should be adopted. The Report and Recommendation’s
 5 recommendations that ground five be dismissed as unexhausted and procedurally barred, as well
 6 as denied on the merits should also be adopted.

7 **Certificate of Appealability.** The district court should grant an application for a
 8 Certificate of Appealability only if the petitioner makes a “substantial showing of the denial of a
 9 constitutional right.” 28 U.S.C. § 2253(c)(3). To obtain a Certificate of Appealability under 28
 10 U.S.C. § 2253(c), a *habeas* petitioner must make a showing that reasonable jurists could disagree
 11 with the district court’s resolution of his or her constitutional claims or that jurists could agree
 12 the issues presented were adequate to deserve encouragement to proceed further. *Slack v.*
 13 *McDaniel*, 529 U.S. 473, 483–485 (2000) (*quoting Barefoot v. Estelle*, 463 U.S. 880, 893 n.4
 14 (1983)).

15 A certificate of appealability should issue here. In this case, while it is questionable that
 16 Petitioner has made a “substantial showing of the denial of a constitutional right,” 28 U.S.C.
 17 § 2253(c)(3), his sentence is for 38 years. Jurists could agree that the issues presented were
 18 adequate to deserve encouragement to proceed further. *Slack*, at 483-485. The Report and
 19 Recommendation’s recommendation that a certificate of appealability should not issue here (Dkt.
 20 22) should not be adopted.

21 Accordingly, it is **ORDERED** that:

22 The Report and Recommendation (Dkt. 24) **IS ADOPTED** in all respects except for the
 23 recommendation that a certificate of appealability should not issue:
 24

1 (1) Petitioner's grounds for relief **ARE DENIED** on the merits;

2 (2) Further, Petitioner's ground five **IS DISMISSED** as unexhausted and procedurally
3 barred; and

4 (3) A certificate of appealability **IS ISSUED**.

5 The Clerk is directed to send uncertified copies of this Order to U.S. Magistrate Judge J.
6 Ricard Creatura, all counsel of record and to any party appearing *pro se* at said party's last
7 known address.

8 Dated this 2nd day of March, 2017.

9
10 

11 ROBERT J. BRYAN
12 United States District Judge
13
14
15
16
17
18
19
20
21
22
23
24